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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-854

TRANS WORLD AIRLINES, INC.

Petitioner,

—against—

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Respondents.

BRIEF FOR RESPONDENTS HUGHES TOOL COMPANY AND RAYMOND M. HOLLIDAY IN OPPOSITION

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January 16, 1976.

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The petition of Trans World Airlines, Inc. ("TWA") seeks review of a decision of the United States Court of Appeals for the Second Circuit (reported at 515 F.2d 173 and appearing at A-3 *et seq.* of the Appendix annexed to the petition)* that allowed to respondents Hughes Tool Company ("Toolco")** and Raymond M. Holliday as costs of appeal expenses incurred in providing security in lieu of a supersedeas bond in order to obtain a stay of judgment pending appeal and this Court's review and ultimate reversal of the judgment.

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* References A- are to the Appendix to the petition; references App. are to the Joint Appendix in the Court of Appeals.

** In December, 1972, Hughes Tool Company changed its name to "Summa Corporation." For convenience, however, it is referred to herein by its prior name.

Question Presented

Was it error for a court of appeals to reverse a determination of a district court and allow as costs of appeal expenses incurred in staying execution of a judgment pending appeal and ultimate reversal of the judgment when (a) a supersedeas bond could not be obtained to secure the judgment because of its size, (b) the district court made other provisions to secure the judgment, (c) the expenses were necessarily incurred to carry out the provisions of the stay order, and (d) the district court set forth no criterion for the disallowance of these expenses as costs of the appeal other than that the party pursuing the appeal should bear the costs of allowing its business to go on as usual?

Counter-Statement of the Case

On April 14, 1970, the District Court for the Southern District of New York entered judgment in favor of TWA in the amount of $145,449,141.07 on TWA's antitrust complaint (312 F. Supp. 478). The Court of Appeals affirmed (332 F.2d 602). This Court, on January 10, 1973, reversed the judgment below with directions to dismiss the complaint (409 U.S. 363). TWA now seeks to have this Court review the allowance by the Court of Appeals as costs of appeal of expenses incurred in obtaining a stay of execution pending this successful appeal.

The Stay

The unprecedented size of the judgment made the obtaining of a supersedeas bond impracticable (App. 80a-81a). For this reason Toolco sought a stay of execution either without security or secured (a) by a lien on specific property to secure the compensatory portion of the judgment and (b) by the condition that Toolco maintain a net worth in excess of three times the amount of the judgment. TWA

opposed the application. It took the position that a stay should not be granted unless Toolco posted a bond in the amount of $161 million, as required by Local Rule 33.

The District Court recognized that under these unusual circumstances "Toolco could not be called upon to post a bond in the amount upon which TWA was insisting" (App. 23a). Ultimately it determined that Toolco should post security in the amount of $75 million and that "[t]he balance of $86,447,686.59 shall be secured along the lines suggested by the defendants as to the maintenance of Toolco's net worth at three times the amount of such balance." (App. 81a). It directed counsel to work out the details of the arrangement.

Pursuant to the court's direction, counsel for TWA and counsel for Toolco prepared an order in a form to which each consented. This consent order (App. 86a-91a) provided for a stay pending appeal on the condition that Toolco file a supersedeas bond in an amount not less than $75 million and maintain a net worth in excess of $335 million. The order required Toolco to furnish to TWA an audited balance sheet on a quarterly basis together with a certificate of Haskins & Sells that Toolco's net worth was in excess of $335 million (App. 86a-91a). Thereafter the District Court entered an order to permit Toolco to substitute for a supersedeas bond a letter of credit from the Bank of America in favor of TWA in the amount of $75 million (App. 104a-105a).

The Bank of America would issue the required letter of credit only on the condition that Toolco secure it (App. 174a-175a). Part of that security took the form of the proceeds of a real estate loan against a recorded Deed of Trust. Toolco paid the Bank of America a fee of $12,500 in connection with this loan, paid $53,488.80 for title insurance and $51.60 for recordation, or a total of $66,040.40 (App. 174a-175a).

Toolco provided the security required by the District Court's order. Upon affirmance by the Court of Appeals of the judgment, Toolco sought to continue the stay on the same terms, pending the filing of a petition to this Court for a writ of certiorari. TWA resisted. When the Court of Appeals granted a stay of its mandate only on the condition that Toolco in addition to the letter of credit file a supersedeas bond in the amount of $85 million, this Court, on the application of Toolco, granted a stay of the mandate without requiring additional security (404 U.S. 930). The effect of this order was to require Toolco to continue to furnish to TWA, until the reversal of the judgment, the quarterly audits that the District Court order required.

The Taxing of Costs

The District Court allowed as costs of appeal the amount of the fee that Toolco paid to the Bank of America for the $75 million letter of credit. This fee, amounting to one-half of one per cent per annum, totaled $1,015,629. The District Court disallowed, however, $617,765 in charges for the quarterly audits, not because the amount of these charges was unreasonable or because they were in any way unnecessary under its order but solely on the ground that Toolco "was most interested in conducting business as usual" and "should bear the costs of allowing business to go on as usual." (A-2). The District Court also disallowed as costs expenses of $66,040.40 incurred in securing the letter of credit. It gave no reason for this disallowance other than the terse statement: "Such costs must be borne by the defendant." (A-1).

The Decision of the Court of Appeals

The Court of Appeals reversed the determination of the District Court that denied to Toolco these costs of obtaining a stay and awarded to Toolco the expenses it incurred in securing the letter of credit and in furnishing the quar-

terly audits (Judge Timbers dissenting from the allowance of the cost of the quarterly audits).

The Court of Appeals recognized that costs are allowable in the exercise of the District Court's discretion. It also recognized, however, that the cost of a supersedeas bond is always a cost incurred to permit business as usual. For this reason, the District Court had set forth no criterion for the disallowance of the cost of the quarterly audits. Accordingly, the Court of Appeals reversed the disallowance as arbitrary.

The Court of Appeals could find no distinction between the interest payable for the letter of credit, which the District Court had allowed as a cost, and the cost of the quarterly audits, which the District Court had disallowed, "since they both went to providing adequate security to TWA." (515 F.2d at 178; A-10). The Court of Appeals pointed out that had the letter of credit been obtained in the full amount required, and the same fee been charged, the additional fee for the letter of credit would have exceeded by $522,000 the audit costs that the District Court had disallowed. Thus, the type of security ordered substantially reduced the costs otherwise taxable against TWA.

The Court of Appeals held that the District Court also acted arbitrarily in disallowing the cost of obtaining the letter of credit while allowing the fee paid for the letter of credit, particularly since "the letter of credit arrangement, which was consented to and approved by TWA, did indeed cost less than a surety bond would have cost and hence in the end—because TWA lost on the appeal—saved it money." (515 F.2d at 177; A-11).

Reasons For Denying The Writ

The decision that TWA seeks to have this Court review represents the application of ordinary rules in an unexceptionable manner in an unusual case.

TWA does not question that under Rule 39 of the Federal Rules of Appellate Procedure the costs of the appeal were properly taxable against it. Nor does it question that the cost of providing security to obtain a stay is a cost of appeal. It could not, for Rule 39(e) of the Federal Rules of Appellate Procedure provides that "the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal . . . shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule."

The costs that the Court of Appeals allowed were costs of preserving rights pending appeal. They were necessarily incurred in order to furnish to TWA the security that the District Court required in lieu of providing the supersedeas bond that was not obtainable.

Thus, all that the Court of Appeals did was to apply the rules to a case in which security other than a supersedeas bond was provided at what the Court of Appeals stated to be "a cost less than a surety bond would have cost . . . ." (515 F.2d at 177; A-11). There was no departure from established principles but rather their application to a novel situation that is not likely to recur with any frequency, if at all.

The Court of Appeals did not substitute its discretion for that of the District Court. Rather, it held that the District Court's disallowance of these items of cost was arbitrary, particularly since the cost of the audits protected $86 million of the judgment for two and three-quarter years at a fee less than the fee allowed in connection with the letter of credit.

The disallowance was arbitrary because disallowing costs of obtaining a stay pending appeal for the reason that they represented "the costs of allowing business to go on as usual" is disallowing the costs for no reason. The fee charged for the letter of credit was a cost of allowing busi-

ness to go on as usual and it was allowed. The purpose of a stay pending appeal in this or any other case is to allow business to go on as usual so long as the payment of the judgment is secured to the plaintiff in the event of affirmance.

The correction of arbitrary action even in an area in which the district court has wide discretion is a normal function of a court of appeals and the exercise of this function is as appropriate in the case of the allowance or disallowance of costs as in any other area. *Cf., Nuzzo* v. *Rederi A/S Wellenco, Stockholm, Sweden,* 325 F.2d 994, 995 (2d Cir. 1963); *McDonnell* v. *American Leduc Petroleums, Ltd.,* 456 F.2d 1170, 1188 (2d Cir. 1972); *Oscar Gruss & Son* v. *Lumbermens Mut. Cas. Co.,* 422 F.2d 1278, 1284 (2d Cir. 1970).

In reality TWA's attack on the decision rests not on principle but on a contention that it did not desire audited quarterly financial statements and thus the expenses incurred to obtain them were unnecessary.* That contention would not merit the granting of the writ even if the Court of Appeals had misapprehended the record.

The Court of Appeals did not misapprehend the record. The stay order, to which TWA consented, required Toolco to furnish the quarterly audited financial statements. If Toolco did not furnish them, the stay ended and TWA could proceed to execute on the judgment. If TWA did not desire quarterly audits, then it had only to say so in connection with the preparation of the order to which it consented or by waiving the requirement thereafter. These controlling considerations remain unchanged whether counsel for Toolco or counsel for TWA first suggested the audits

* Since the cost of securing $85 million of the judgment in this manner was some $552,000 cheaper than the cost that would have been incurred had the $85 million been secured in the same manner as the remaining $75 million, there was no departure in any event from the principles set forth in *Farmer* v. *Arabian American Oil Co.,* 379 U.S. 227 (1964).

as a means of securing $85 million of the judgment and regardless of suggestions that the District Court did not adopt as to some other method of securing the judgment.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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